91-1055

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RWM ENTERPRISES, INC. and
MOORE AUTOMOTIVE GROUP, INC.,
Petitioners,

vs.

ES DEVELOPMENT, INC. and EDWIN G. SAPOT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID O. DANIS
Attorney for Petitioners
DANIS & BOYCE
100 South Brentwood Blvd.
Suite 125
St. Louis, Missouri 63105
(314) 721-0900

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTION PRESENTED

1. When automobile dealers combine to form a group, hire an attorney and an expert as a group and then individually send a standardized letter pursuant to their Franchise Contract to their respective manufacturers opposing the granting of a new franchise in their geographic area, have they engaged in activity which violates the Sherman Anti-Trust Act?

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The petitioners, RWM Enterprises, Inc. and Moore Automotive Group, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above proceedings on July 18, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 939 F.2d 547 (8th Cir. 1991) and is reproduced in the Appendix, page A-1, *infra*.

The memorandum decision of the United States District Court for the Eastern District of Missouri (Limbaugh, J.) has not been reported. It is reproduced in the Appendix, page A-26, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on July 18, 1991, affirming injunctive and other relief entered against the Petitioners, issued pursuant to 15 U.S.C. § 26 (1988). Jurisdiction was conferred upon the court of appeals generally by 28 U.S.C. § 1291 authorizing appeals in all civil cases. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTE INVOLVED

15 U.S.C. § 1 provides in relevant part:

> "Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal . . . ."

STATEMENT OF THE CASE

On October 3, 1989, the Respondents filed a multi-count complaint seeking injunctive and other relief pursuant to the Sherman and Clayton Anti-Trust Acts. On October 6, 1989, Respondents' Motion for a Temporary Restraining Order was submitted to the trial court and denied. Thereafter, on that same date, a preliminary hearing was set for October 23, 1989. On that date evidence was submitted to the trial court and the case was submitted upon Respondents' request for preliminary and permanent injunctive relief. Prior to the hearing on October 23, 1989 the Respondents settled with a number of the Defendants and the case was submitted against the Petitioners only. On December 27, 1989 the court entered its injunctive relief which was timely appealed and ultimately denied in substantial part by the Eighth Circuit Court of Appeals.

Petitioners filed a request for rehearing before the panel and a rehearing en banc which was denied by the court of appeals. Petitioner seeks Supreme Court review of the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Introduction

Congress enacted the Sherman Anti-Trust Act to prohibit illegal group or concerted activity. The District Court and the Eighth Circuit Court of Appeals in their decision have now made group activity all of which is admittedly legal and proper to be violative of the Sherman Anti-Trust Act.

If the Eighth Circuit's decision is allowed to stand then no group or association of individuals can meet together with a legitimate purpose and through legitimate means attempt to protect their contractual franchise rights.

In this case, ES Development, Inc. (hereinafter "ESD") is a Missouri real estate development corporation whose sole purpose was to develop an automobile mall in St. Louis County, Missouri. Edwin G. Sapot (hereinafter "Sapot") was ESD's president and sole shareholder. It was the intent of the automobile mall to operate in the manner of a condominium complex housing multiple automobile dealerships. It was intended that each participating dealer would purchase a space within the malls and would share common ownership of the service facility and common expenses such as advertising.

A group of eight individuals representing nine automobile dealership, including Petitioners, most of whom were located in close proximity to each other and approximately ten miles from the proposed automobile site, attended a meeting on March 31, 1989. At this meeting, an attorney met with the group. This group decided to hire the attorney to represent them in an effort to lower expenditures, in their opposition to each of their respective manufacturers locating an additional competing same line dealer in the mall and to jointly commission a market study.

These dealers held a second meeting on April 6, 1989 at which time a name for their group was selected and they adopted a group statement of purpose.

At the April 6 meeting the group's attorney gave each of the dealers a standardized letter which each dealer could send, if they desired, to their respective manufacturer opposing the location a same line franchise to the proposed automobile mall. Most of the dealers sent the proposed form letter to their respective manufacturer.

The Respondents contended that the result of the manufacturer receiving the opposition letter by their dealers resulted in the mall being unable to be successfully pursued. Although the Petitioners dispute that this was established, assuming arguendo, that this was established, the Respondents still did not show any act which rose to the level of a Sherman Act violation.

I.

THE WORDS "CONTRACT, COMBINATION . . ., OR CONSPIRACY IN RESTRAINT OF TRADE" SHOULD BE CONSTRUED TO EXCLUDE CONSTITUTIONAL AND CONTRACTUALLY PROTECTED RIGHTS

The Petitioners did nothing more than jointly hire an attorney and an expert in an effort to lower costs. The attorney then prepared a standard form letter. The courts below and the Respondents admitted that all the steps taken by the Petitioners were legal. The sole argument was that since the Petitioners acted with other automobile dealers that this legal activity somehow became illegal. It has been well established that in order to prove a violation of the anti-trust laws that the participants must combine or conspire to "achieve an unlawful objective". *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

There is no dispute that there was a combination of a group of automobile dealers. There is also no dispute that the actions taken by the automobile dealers were legitimate. There is also no dispute that each automobile dealer objected to an additional same line dealer being placed in the automobile mall or any other location within the geographic market of Metropolitan St. Louis. The group's purpose was to work together to legitimately oppose additional franchises being granted without regard to existing franchises. In fact, the actions taken by Petitioner in writing the letter to their respective manufacturers were clearly constitutionally protected and within their contractual rights under their respective franchise agreements. The Respondents even admit that they expected the dealers to oppose the mall to their manufacturers. Petitioners contend that this case has broadened the anti-trust laws to include any combination even though there is no illegal purpose or no illegal activities.

CONCLUSION

This case presents important anti-trust issues squarely and clearly. No material facts are in dispute. The Supreme Court can save lower courts from years of litigation by accepting review and examining the constitutional and contractual implications of this decision which greatly expands courts' anti-trust power.

Dated: December 2, 1991.

Respectfully submitted,

/s/ DAVID O. DANIS
Attorney for Petitioners
100 South Brentwood Blvd.
Suite 125
St. Louis, Missouri 63105
(314) 721-0900

APPENDIX

APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 90-1760/1761/2466/2467EM

ES Development, Inc., and Edwin G. Sapot,
Appellees,

vs.

RWM Enterprises, Inc., d/b/a Moore Cadillac; and Moore Automotive Group, Inc., Moore Hyundai,
Appellants.

Order Denying Petition for Rehearing with
Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

September 3, 1991

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

No. 90-1760

ES Development, Inc., and Edwin G. Sapot,
Appellees,

v.

RWM Enterprises, Inc., d/b/a Moore Cadillac; and, Moore Automotive Group, Inc., d/b/a Moore Hyundai,
Appellants.

No. 90-1761

ES Development, Inc., and Edwin G. Sapot,
Appellants,

v.

RWM Enterprises, Inc., d/b/a Moore Cadillac; and, Moore Automotive Group, Inc., d/b/a Moore Hyundai,
Appellees.

No. 90-2466

ES Development, Inc., and Edwin G. Sapot,
Appellees,

v.

RWM Enterprises, Inc., and Moore Automotive Group, Inc.,
Appellants.

No. 90-2467

ES Development, Inc., and Edwin G. Sapot,
Appellants,

v.

RWM Enterprises, Inc., and Moore Automotive Group, Inc.,
Appellees.

Appeals and Cross-Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: March 11, 1991
Filed: July 18, 1991

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and MAGILL, Circuit Judge.

BRIGHT, Senior Circuit Judge.

Appellants, RWM Enterprises, Inc. and Moore Automotive Group, Inc. (RWM/Moore), appeal from an order of the district court,[1] issued pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26 (1988), permanently enjoining them from jointly or individually communicating their opposition to the proposed development of an automobile mall by appellees ES Development, Inc. (ESD) and Edwin G. Sapot (Sapot). The district court held that appellants and seven other automobile dealers combined and conspired to attempt to prevent ESD, a prospective competitor, from entering the automobile retail market in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1988). On appeal, appellants assert (1) the conclusions of the district court are not supported by sufficient evidence and (2) the resulting injunction is illegally overbroad. ESD counterappeals on the issue of attorney fees and costs, contending that the district court erred in awarding only 25% of the amount it found to be reasonable. We affirm the findings and judgment of the district court as amply supported by the evidence and affirm the fee award. However, we remand for modification of the injunction.

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[1] The Honorable Stephen H. Limbaugh, United States District Judge for the Eastern District of Missouri.

I. BACKGROUND

ESD is a Missouri real estate development corporation founded by Sapot, who is its president and sole shareholder. ESD's sole pursuit was to develop an automobile mall in St. Louis County, Missouri. The mall would operate in the manner of a condominium complex. ESD would finance and construct the necessary facilities for multiple auto dealerships to operate. It would then sell outright to each participating dealer a dealership space within the mall. All of the participating dealers would share common ownership of the mall's service facility and would share common expenses like advertising.[2]

ESD accordingly entered into various option contracts to secure the right to purchase a contiguous ninety acre tract of land in Chesterfield, Missouri, upon which it planned to develop what would be known as the Chesterfield Auto Mall ("Mall"). To date, ESD and Sapot have spent approximately $350,000 in the development of the Mall. These expenditures include the cost of purchasing the land options as well as the costs associated with securing the approval of various state and local governmental agencies for the development of the project. The associated costs include engaging the professional services of an engineering company, an accounting firm, an architectural firm, a construction company, a media consultant and a project banker.

The ultimate success of the development of course depended upon the willingness of automobile manufacturers to commit new dealerships to or relocate existing dealerships in the Mall. Typically, the decision to award a new franchise rests with the automobile manufacturers. The manufacturers base their decisions upon market studies addressing the need and the financial

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[2]The parties agree that the automobile mall concept is of recent vintage and had not yet been attempted in the St. Louis market area.

prospects for opening a dealership in a particular area, including the effect a new dealership might have on the profitability of existing same-line dealerships in the relevant market. ESD, through Sapot, contacted various automobile manufacturers, a number of which expressed initial interest in the project. As part of his discussions with the manufacturers, Sapot made inquiries into the prospect of personally acquiring and operating at least one of the dealerships to be placed in the Mall. Plaintiffs also separately contacted various local dealerships about the possibility of relocating in the Mall, again receiving favorable initial reactions. Although the plaintiffs' inquiries met with a favorable initial reception, none of the manufacturers or dealers made a firm commitment to the Mall.

ESD's activities caught the attention of several dealership owners within the general market area of the anticipated Mall site, causing some of them considerable concern. If operating as planned, the Mall would contain numerous car dealerships at a single site and thus provide consumers with the convenience of one-stop shopping. Some dealers therefore feared that the establishment of a same-line dealership in the Mall could divert car shoppers from their dealerships and reduce their gross earnings.

These concerns prompted a proposal that the area dealership owners meet to discuss the development of the Mall. A group of eight individuals representing nine automobile dealerships, including RWM/Moore,[3] most of whom were located in close proximity to each other about ten miles from the proposed ESD

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[3] Appellants RWM and Moore Automotive are each owned and operated by Ron Moore (Moore), who attended the meeting in his capacity as president of both corporations. At least one other dealership owner attended, but departed upon determining that the group planned to conduct an opposition campaign.

project site, attended the first meeting which occurred on March 31, 1989. An attorney in attendance at the request of one of the meeting participants advised the dealers that they must proceed with caution and be sure to couch their opposition so as to not to appear to be acting in concert.

Each dealer in attendance operated under separate franchise agreements which provided procedures for objecting to the placement of a same-line dealership within their market area and required manufacturers or franchisors to give due consideration to any such objections. RWM/Moore's franchise agreements, for example, required the respective manufacturers to notify them of their intention to establish or relocate a same-line franchise within twenty miles of the RWM/Moore dealerships. RWM/Moore then had thirty days to submit objections to the establishment of such a franchise. Franchisees also possessed the right to appeal manufacturer decisions to place a new franchise within eight miles of appellants' dealerships. The full exercise of these contractual rights had the potential of delaying a manufacturer's decision to award a new franchise by several months.

The dealership owners at the meeting agreed that the should exercise their contractual rights of protest in connection with plans for the Mall. However, despite advice counseling against activities which would create an appearance of concerted action, the dealers also agreed to jointly retain the attorney in attendance to represent them in their opposition efforts. Further, with the aid of counsel, the dealers then proceeded to discuss a possible name for their group, a proposed statement of purpose, and the value of jointly commissioning a market study. They concluded the meeting by instructing their attorney to draft (1) a form letter protesting the possible placement of a same-line dealership in the Mall, which each dealer could send to its respective manufacturer and (2) a group statement of purpose.

The dealers held a second meeting on April 6, 1989. At this time, they adopted the name "Dealers Alliance" (Alliance) for their opposition group and named three of the dealers as group representatives. They also reviewed and adopted a group statement of purpose which their attorney had drafted. The statement provided in part:

> The purpose of the Dealers Alliance is to explore and advance areas of common and individual dealer concern with respect to actions of franchisors/manufacturers at the proposed Chesterfield Auto Mall, or any similar geographic location. . . . The goal of the dealer Alliance is to investigate and provide facts and evidence to its members and to the automobile manufacturers concerning the potential impact of the foregoing upon existing automobile dealers. The Dealer Alliance seeks to enable the members and the manufacturers to make informed decisions regarding potential new or relocated dealerships. The further goal of the Dealer Alliance is to insure that the legal rights of its individual members are protected.

The members of the Alliance also agreed to jointly commission a market study which each member could use to counter the market studies conducted by their respective manufacturers and as evidence in any possible lawsuit against a manufacturer for breach of good faith in complying with the terms of the franchise agreement. The attorney for the Alliance also requested that each member complete a questionnaire. The questionnaire, labeled "Privileged and confidential — prepared in anticipation of litigation," requested that each dealer provide the attorney with a copy of his franchise agreement and any information he possessed regarding, *inter alia*, market studies performed by his respective manufacturer, oral representations by his manufacturer concerning the establishment of new dealerships in the area, and the dealers relevant market area.

Finally, prior to the April 6 meeting, each of the members received the form letter of protest drafted by the group's attorney. The form letter stated in part:

> A development known as the Chesterfield Auto Mall is seeking dealers to open new or relocated franchises.... My concern is focused on your action or potential action with respect to locating a dealership in this market area at or near this geographical point.... As you know, [Manufacturer/Franchisor] is under legal obligation, imposed by both U.S. and Missouri law, to deal with me in good faith. I trust that [Manufacturer/Franchisor] will not act arbitrarily, capriciously, or in bad faith when presented with a request for a new or relocated franchise in connection with the Mall and will keep my legitimate franchise interests in mind.

Most, if not all, of the dealers sent letters substantially identical to the form letter to their respective manufacturers.

Plaintiffs have been unable to conduct further negotiations with the manufacturers concerning the placement of franchises in the Mall since the mailing of the letters. For example, representatives from Ford, who had expressed a strong interest in placing a franchise in the Mall, terminated discussions regarding both the placement of a new dealership in the Mall and the possibility of awarding that franchise to Sapot. Representatives from Oldsmobile and Cadillac also declined to proceed with negotiations. The Cadillac zone manager expressly aired his concern that placement of a new dealership in the Mall might spur litigation with RWM/Moore owner and president Ron Moore who had already filed an unrelated action against Cadillac for its awarding of a franchise in another market area. Similarly, in discussing their decision to terminate negotiations, many of the withdrawing manufacturers made specific reference to letters they had received from their respective Alliance franchisees.

ESD and Sapot consequently filed the present action on October 3, 1989 seeking to enjoin the nine participating Alliance dealers from continuing their concerted activities in opposition to the development of the Mall. Plaintiffs asserted that the activities of the Alliance constituted a violation of § 1 of the Sherman Act which makes illegal "Every contract, combination . . . , or conspiracy in restraint of trade." 15 U.S.C. § 1.

Seven of the nine dealers entered into separate settlement agreements with plaintiffs just prior to the scheduled hearing for permanent injunction. The seven dealers variously agreed to pay undisclosed sums of money and agreed not to oppose the development of the Mall for a period of two years. Moore opted to defend the case brought against his two dealerships. After conducting a hearing on October 23, 1989, the district court concluded that the Alliance constituted an illegal combination and conspiracy engaged in a horizontal non-price restraint which it declared a *per se* violation of § 1 of the Sherman Act.

The district court consequently granted injunctive relief pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26. In its order dated December 27, 1989, the district court enjoined appellants from:

> (1) engaging in any form of individual activity, joint activity or coordinated action with any third parties concerning the development, construction or operation of the Chesterfield Auto Mall;
>
> (2) engaging in any form of joint activity or coordinated action with any third parties concerning the granting of one or more automobile franchises to the Chesterfield Auto Mall;
>
> (3) communicating with or responding to communications from any automobile franchisor or manufacturers . . . concerning the Chesterfield Auto Mall, or the award . . . or the relocation of an automobile franchise or dealership in the Chesterfield Auto Mall.

ES Development, Inc. v. RWM Enterprises, Inc., No. 89-1867-C-5 (E.D. Mo. Order of Dec. 27, 1989).

The district court, again pursuant to 15 U.S.C. § 26, also awarded costs and reasonable attorney's fees to plaintiffs as prevailing parties. Plaintiffs accordingly submitted documentation in support of a request for $52,933.50 in fees. In its order of April 11, 1990, the district court stated that plaintiffs had submitted a reasonable figure for the fees generated in the original suit filed against all nine dealers in the Alliance. The district court concluded, however, that fairness dictated that the two remaining defendants, RWM/Moore, not bear the cost of the suit against all nine original defendants. It accordingly awarded plaintiffs 25% of the fees and costs which they requested.

This appeal followed in which RWM/Moore contend that the activities of the members of the Alliance did not violate the Sherman Act and that the district court's order of injunctive relief is overbroad. Plaintiff's ESD and Sapot cross appeal on the issue of the district court's decision to award 25% of the total fees and costs incurred in its action below.

II. DISCUSSION

A. Sherman Act Liability

Appellants contend that the formation and activities of the Alliance and its members are insufficient to give rise to § 1 Sherman Act liability. The essence of a § 1 Sherman Act violation is a contract, combination or conspiracy which unduly restrains trade. *Pumps & Power Co. v. Southern States Indus., Inc.*, 787 F.2d 1252, 1256 (8th Cir. 1986); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 609 (1914); 15 U.S.C. § 1. Appellants specifically assert that the underlying facts do not support the district court's finding of a contract, combination, or conspiracy, and that the group's activities constituted no more than exercise of the constitutional,

statutory and contractual rights of each member to express legitimate self-interested concerns regarding their financial well-being. We reject these assertions.

1. Combination or Conspiracy

As an initial matter, a finding of a § 1 violation requires a finding of a contract, combination or conspiracy. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1265 (8th Cir), *cert. denied*, 449 U.S. 1063 (1980). The simple fact of a conspiracy or combination will not alone support Sherman Act liability. The evidence must establish that the alleged participants combined or conspired to "achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

Proof of such a combination or conspiracy does not depend upon the existence of a formal agreement. *Reed Bros., Inc. v. Monsanto Co.*, 525 F.2d 486, 495 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976). Indeed, it is axiomatic that the typical conspiracy is "rarely evidenced by explicit agreements," but must almost always be proved by "inferences that may be drawn from the behavior of the alleged conspirators." *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981) (quoting *Michelman v. Clark-Schwibel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)), *cert. denied*, 459 U.S. 880 (1982). Thus, an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to "warrant a . . . finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) *quoted in H. L. Moore Drug*, 662 F.2d at 941; *see also Cheatham's Furniture co. v. La-Z-Boy Chair Co.*, 728 F. Supp. 569, 571 (E.D. Mo. 1989), *aff'd*, 923 F.2d 858 (8th Cir. 1990); *cf. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

We agree with the district court that evidence exists to support the conclusion that the dealers, including appellants, entered into a combination or conspiracy in restraint of trade. The dealers met on two occasions for the express purpose of discussing the possible entry of a competitor who might attract their clientele and diminish their profitability. At their second meeting, the dealers agreed to undertake action to frustrate the plans of their prospective competitor, gave a name to their opposition group, and agreed to a statement of purpose. The members of the Alliance further agreed to jointly retain an attorney who provided advise on legal tactics in presenting objections to their respective manufacturers. The group's attorney also drafted a form letter of objection which most of the Alliance members, (including appellants), sent to the manufacturers. The members further agreed to jointly fund a market study to be used as an offensive tool against the manufacturers in the event of a lawsuit.

Appellants do not contest the fact that they participated in these activities. However, they do take issue with the district court's legal characterization of them. They particularly assert that the dealers met for the sole purpose of protecting their individual rights under their respective franchise agreements. Appellants further assert that the dealers' meeting was motivated by concern over merely the placement of same-line dealerships in the Mall, a matter within the legitimate scope of the individual franchise agreements.

The evidence supports the district court's determination that the dealers' motivation extended to a concern well beyond the legitimate scope of the individual contractual rights of protest provided under the franchise agreements; that is, concern regarding the very existence of the Mall, regardless of the type of automobile lines which might be sold there. The concept behind the Mall was, in part, to provide automobile consumers with the convenience of one-stop shopping. Additionally, the Mall concept apparently would permit participating dealers to lower

their operating costs and margins by sharing service facilities, thus allowing them to compete more effectively.[4] These features, which would inhere in the Mall itself, rather than in the placement of any particular type of franchise line in the Mall, created the potential for reducing floor traffic and thus sales and profitability of the Alliance members' dealerships.

Appellants also contend that the members of the Alliance did no more than independently exercise individual legal rights. It is true that the Sherman Act does not impart liability for actions by an individual, regardless of their anticompetitive motive or effect, unless the individual entity possesses monopoly power. *See, e.g., Pumps & Power Co.*, 787 F.2d at 1256. The evidence here, however, compels the inference that the dealers chose to exercise their individual legal rights in a concerted manner designed to impair plaintiffs' ability to procure franchise commitments from various manufacturers.

Furthermore, while we do not question the legality of appellants' separately filed protests, "[a]cts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade." *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587 (7th Cir. 1977), *cert. denied*, 439 U.S. 1090 (1979); *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 (1962) (exercise of individual and legal contract right runs afoul of Sherman Act where done so as "part and parcel of unlawful conduct with others or . . . conceived in a purpose to restrain trade, control a market, or monopolize."); *Simpson v. Union Oil*

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[4] This underlying business rationale was evidence by plaintiffs' testimony stating that the project was not feasible without a threshold number of franchise commitments from manufacturers. Without the requisite number of commitments, plaintiffs testified that they would not exercise their options to purchase the land at the proposed Mall site.

Co., 377 U.S. 13, 21 (1964) (undertaking of otherwise legal arrangement unlawful when exercised to advance illegal antitrust purpose). Thus, the otherwise legal nature of appellants' activities in furtherance of their conspiracy do not shield them from antitrust liability.

The present case provides a further example of the antitrust maxim that "even an otherwise lawful device may be used as a weapon in restraint of trade." *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948). As noted above, the success of plaintiffs' project depended upon the acquisition of multiple manufacturer commitments to place franchises in the Mall. However, the lawful franchise agreements bound the manufacturers to consider the objections of same-line dealers within a certain distance of the Mall. An objection could delay a manufacturer's decision for months or longer, particularly in the event of a lawsuit by a franchisee.

Plaintiffs' ultimate success, of course, did not hinge upon the decision of any one manufacturer. However, the concerted exercise of legal contractual rights by Alliance members simultaneously precluded numerous manufacturers from making a commitment to the Mall during the crucial period when the clock was running on plaintiffs' options to purchase the land at the project site. Beyond any effort to simply exercise their legal right to bring their franchise placement objections to the attention of the manufacturers, the concerted exercise of such rights by the members of the Alliance appears to have been designed to dissuade plaintiffs from exercising their options on the land, a result which no dealer could have brought about acting alone.

Moreover, by concertedly exercising their independent contract rights to block plaintiffs' access to the manufacturers, the Alliance, in effect, exercised a sort of veto over the entry of a new competitor to the market. We have previously suggested, albeit in a different context, that the exercise of veto power over a new

franchise application by horizontal competitors constitutes a patently unreasonable restraint of trade. *See Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 470-71 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).[5] Again, no dealer would have been able to bring about such a result acting alone. Furthermore, although the dealers coordinated merely the simultaneous exercise of legitimate contract rights, their motivations clearly exceeded the scope of concerns for which the protest provision of the franchise agreements were designed. In sum, the antitrust laws do not countenance such a concerted individual exercise of the otherwise legal rights of the members of a conspiracy to achieve a combined effect in restraint of trade in excess of that possible were the conspirators to act alone. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966).

Appellants also attempt to clothe the actions of the Alliance and its members in the garb of protected first amendment commercial speech. However, it is well-established that the exercise of such rights as an integral part of an illegal conspiracy will not shield the conspirators from antitrust liability. *See, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972). Here, the Alliance members combined and conspired to concertedly exercise their constitutionally protected rights of commercial speech to block the entry of a new

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[5] *Quality Mercury* involved an exclusive franchise agreement between an automobile manufacturer and a single franchisee which effectively gave the latter a veto over the manufacturer's decision to locate a new same-line franchise in the relevant market. As such, the case involved merely a vertical agreement in restraint of trade, an arrangement which inspires a significantly lower level of opprobrium than horizontal agreements. *Id.* at 470-71 & n.5; *see Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). The present case presents us with a stronger basis for condemning an effective veto over franchise decisions because, unlike *Quality Mercury*, we are presented with an agreement among numerous horizontal competitors. *See infra*, § A.2.

competitor into their market. Thus, we conclude that the district court properly rejected appellant's constitutional arguments. We therefore affirm the district court's finding of a combination or conspiracy in restraint of trade.

2. Unreasonable Restraint of Trade

Because all contracts, combinations, or agreements among economic actors in some sense restrain trade, *National Collegiate Athletic Assoc. v. Board of Regents*, 468 U.S. 85, 98 (1984), an antitrust plaintiff must demonstrate that the combination or conspiracy in question resulted in an undue or unreasonable restraint of trade. *See, e.g., Pumps & Power Co.*, 787 F.2d at 1256. The antitrust plaintiff may establish an unreasonable restrain of trade by evidence showing that (1) the conspiracy was of a type that the law finds to be inherently unreasonable (a *per se* violation), or (2) that the conspiracy had an anticompetitive motive or effect (a rule of reason violation). *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *Rosebrough Monument Co. v. Memorial Park Cemetery Assoc.*, 666 F.2d 1130, 1138 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

The classic form of a *per se* § 1 Sherman Act violation is a combination, conspiracy or agreement between competitors at the same level of the market to restrain competition; the so-called "horizontal" restraint of trade. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596,. 607-08 (1972); *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d at 470-71 & n.5. We affirm the district court's determination that the Alliance constituted a horizontal restraint of trade and thus warrants condemnation as a *per se* violation of the Sherman Act.

Appellants assert that the restraint in question here is not horizontal, but rather a vertical non-price restraint, consisting

only of letters sent individually by the dealers to the manufacturers at a higher level in the market structure. If this were so, we would be constrained to analyze the present case under the rule of reason standard which is presumed in vertical non-price restraint cases. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988); *Cheatham's Furniture*, 728 F. Supp. at 571. However, we reject appellants' attempt to recast their activities as part of a vertical non-price restraint.

As we concluded in the previous action, the evidence demonstrates that the opposition campaign arose from an agreement among the nine dealers to take parallel actions to frustrate the entry of a new competitor into retail market. In this respect, the facial appearance of the Alliance conspiracy is similar to one which the Supreme Court rejected in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In that case, General Motors attempted to enforce order in its Los Angeles area market when it presumed recalcitrant dealers not to conduct business with discounters. G.M. took this action in response to individually filed complaints from other Los Angeles area G.M. dealers who found that they were being undersold by the discounters.

As in the present case, the individually filed dealer complaints arose from an agreement among the complaining dealers to concertedly take simultaneous, parallel action in opposition to the practices of their more aggressive competitors. Thus, although General Motors' action on its face seemingly imposed a vertical restraint in response to vertical activity from individual dealers, it came as a result of inducements emanating from a horizontal agreement among the dealers to constrain competitive activity at the same dealer level.

The petitioners in *General Motors* attempted to characterize their activities as vertical in nature, however, the Supreme Court rejected this argument, declared the dealers' activities to be horizontal in nature and condemned them as a *per se* violation of

§ 1 of the Sherman Act. The Court concluded by stating that "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation of the underlying conduct." 384 U.S. at 146 (citation omitted). Similarly, in the present case, appellants and other dealers acted to frustrate a prospective competitor's access to same-line products by means of a concerted campaign of vertical communications with the manufacturers. The dealers' actions in the present case therefore emanated from a horizontal agreement and thus constitute a *per se* violation of the Sherman Act.

B. Injunctive Relief

Appellants next challenge the propriety of the scope of the district court's order of injunctive relief. They contend that the district court failed to properly balance the equities in fashioning its injunction. More specifically, appellants assert that the portions of the injunction enjoining them from "engaging in any form of individual activity" and individually "communicating with or responding to communications from" their respective manufacturers regarding the Mall or the placement of a franchise in the Mall, are overbroad in that they prohibit them from exercising their constitutionally protected rights of commercial speech. We conclude that the district court has the authority to impose certain restrictions upon the commercial speech of individual entities who have violated the Sherman Act. However, we believe that the district court's failure to limit the duration of its restraint against appellants' exercise of their rights of commercial speech renders the relief overbroad, particularly in light of its commercial implications.

Upon finding an antitrust defendant guilty of a violation of the Sherman Act, a district court is "empowered to fashion appropriate restraints on [the defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences."

National Soc. of Professional Engineers v. United States, 435 U.S. 679, 697 (1978). In fashioning a remedy, a district court should endeavor to ensure that the conspirators "so far as practicable, [are] denied future benefits from their forbidden conduct." *United States v. United States Gypsum Co.*, 340 U.S. 76, 89 (1950). Thus, the district court may consider both the "continuing effects of past illegal conduct," *Wilk v. American Medical Ass'n*, 671 F. Supp. 1465, 1485 (N.D. Ill. 1987), *aff'd*, 895 F 2d 352 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2621 (1990); *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 236 (9th Cir. 1976), and the possibility of "lingering efforts" by the conspirators to capitalize on the benefits of their past illegal conduct. *Wilk*, 671 F. Supp. at 1484; *see International Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947).

In the present case, appellants clearly could continue to reap the benefits of their past illegal conduct as members of the Alliance if left free to individually pursue their objections to the development of, and the placement of franchises in, the Mall. Appellants object to the injunction as a restraint upon their constitutional rights of commercial speech. We agree with this characterization of the impact of the injunction in the present case,[6] however, "[i]t is well-settled that First Amendment rights are not immunized from regulation when they are used as an

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[6] Appellants' individual communication with their respective manufacturers clearly is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 561 (1980). Thus, we agree that the district court's order restrains appellants in the exercise of their rights of commercial speech which are protected under the First Amendment. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

integral part of conduct which violates a valid statute."[7] *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972); *see also National Soc. of Professional Engineers*, 435 U.S. at 697-98. Thus, while we agree that the resulting order may curtail appellants in the exercise of liberties that they might otherwise enjoy, we believe that is a "necessary and . . . unavoidable consequence of the[ir] violation" of the antitrust laws. *National Soc. of Professional Engineers*, 435 U.S. at 697.[8]

Although we affirm the district court's decision to impose a form of relief which hinders appellants in the exercise of their rights of commercial speech, we are constrained to observe that the district court's broad equitable powers are not without limit. Indeed, the district court is limited by the requirement that it

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[7] This is particularly true in cases involving commercial speech, because although it is constitutionally privileged, the "Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson* at 562-63 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978)).

[8] In upholding an order restricting the range of expression that a professional association could make regarding the ethics of competitive bidding, the Court in *National Soc. of Professional Engineers* observed that even injunctions against price-fixing, one of the more egregious violations under the Sherman Act, abridge the freedom of businessmen to communicate with one another about prices. 435 U.S. at 679. In making this observation, the Court suggested that even the most basic forms of equitable relief under the Sherman Act necessarily involve some type of restriction against the First Amendment protected right of commercial speech. In responding to the petitioner's objections to the district court's injunction on First Amendment grounds, the Court stated "the First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . .' " 435 U.S. at 697 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Similarly, in the present case, appellants' argument proves too much insofar as it would invalidate much of the antitrust relief upheld by the Supreme Court over the past century and render effective enforcement of the antitrust laws all but impossible.

"model [its] judgment[ ] to fit the exigencies of the particular case." *International Salt Co. v. United States*, 332 U.S. at 400-01. A proper tailoring of relief to the exigencies of a particular case is especially important in cases such as the present one, in which the relief granted necessarily carries constitutional implications. Moreover, it is well-established that limitations upon commercial speech must be "narrowly drawn[,] . . . extend[ing] only as far as the interest it serves." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 (1980) (citation omitted).

In the present case, the district court's order enjoins appellants from communicating with their respective manufacturers concerning the Mall for the indefinite future. While a limitation upon such activities is necessary to prevent appellants from both reaping and perpetuating the benefits of their past illegal conduct, the continuing effects of the conspiracy are certain to recede with time. Thus we believe that the district court's open-ended restriction upon appellants' individual exercise of their constitutionally protected rights of commercial speech is inappropriate under the present circumstances.

The district court noted that the seven original defendants who chose to settle plaintiffs' claims against them prior to trial agreed not to oppose the development of the Mall for a period of two years. Plaintiffs' agreement to this term of relief suggests to us some measure of what plaintiffs themselves deemed reasonable under the circumstances.[9] We therefore remand to the district curt for the limited purpose of modifying the injunction by placing a reasonable time limit upon its prohibition against appellants' individual exercise of their rights of commercial speech concerning the Chesterfield Auto Mall. We suggest in

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[9] We recognize that the plaintiffs are not bound to the two-year term of relief arrived at through compromise and settlement with the other parties.

light of the record before us that such a limitation probably ought not to exceed three years, but leave such period subject to further determinations by the district court.

C. Attorney Fees

ESD and Sapot counterappeal on the issue of the district court's award of fees and costs. They assert error in the fact that the district court awarded only 25% of what it had expressly deemed to be reasonable fees and costs for the case. After reviewing plaintiffs' documentation, the district court stated that plaintiffs' request for $52,933.50 constituted a reasonable figure for the fees incurred in the original suit filed against all nine dealers in the Alliance.[10] It concluded, however, that fairness dictated that RWM/Moore not bear the legal expenses of the suit against all nine original defendants. It accordingly awarded plaintiffs 25% of the requested fees and costs, roughly appellants' *pro rata* responsibility for the total fees as against all of the original defendants. Plaintiffs now assert that the district court failed to properly consider its contention that it would have had to incur approximately the same fees and costs even if it had originally filed suit against only the two defendants who proceeded to trial rather than all nine participants in the conspiracy.

"The district court is vested with significant discretion in determining a reasonable fee." *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 337 (8th Cir. 1982) (citing *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980)), *rev'd on other grounds on reh'g*, 727 F.2d 692 (8th Cir. 1984); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 650 (7th Cir.

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[10] It modified plaintiffs' cost documentation to arrive at a figure of $3,899.06 in the action as originally filed against all nine members of the Alliance.

1985). We review the factual basis for an award of attorney's fees in an antitrust action under a clearly erroneous standard and a district court's determination of the amount of a fee award under an abuse of discretion standard. *Id.*, *cf. H.J., Inc. v. Flygt Corp.*, 925 F.2d 257 (8th Cir. 1991) (same standard of review applies to fee award for successful antitrust damages claimant); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (same standard of review applies to fees awarded under 42 U.S.C. § 1988).

The district court was made aware of the fact that the defendants agreed to pay an undisclosed sum of money as part of their settlement agreements. We note that at oral arguments before this court plaintiffs were unable to state with certainty whether they ever informed the district court of the precise amount of money the settling defendants agreed to pay. Under these circumstances, we believe that it fell within the discretion of the district court to decide that fairness dictated that appellants be held responsible for no more than their approximate *pro rata* share of the total fees and costs. We therefore affirm the district court's award of 25% fees and costs.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's finding of Sherman Act liability against appellants and its award of fees and costs. We remand this case to the district court, however, for the limited purpose of modifying the injunction by placing a reasonable time limit upon its restriction against appellants' individual exercise of their rights of commercial speech concerning the Chesterfield Auto Mall.

Appellee is entitled to 50% of its costs on appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-1867-C-5

ES DEVELOPMENT, INC. and EDWIN G. SAPOT,
Plaintiffs,

vs.

RWM ENTERPRISES, INC., d/b/a MOORE CADILLAC
and MOORE AUTOMOTIVE GROUP, INC.,
d/b/a MOORE HYUNDAI,
Defendants.

ORDER

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that judgment is entered in favor of plaintiffs and against defendants on the merits of plaintiffs' complaint.

IT IS FURTHER ORDERED that plaintiffs are granted the following permanent injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. Defendants, and their respective officers, directors, agents, employees, servants, attorneys or representatives, or any other person or entity acting for or on behalf of such defendants are **ENJOINED** from

(1) engaging in any form of individual activity, joint activity or coordinated action with any third parties concerning the development, construction or operation of the Chesterfield Auto Mall;

(2) engaging in any form of joint activity or coordinated action with any third parties concerning the development, construction or operation of the Chesterfield Auto Mall;

(3) communicating with or responding to communications from any automobile franchisor or manufacturer, or any employee, director, officer, agent, servant, attorneys or representative of any automobile franchisor or manufacturer, concerning the Chesterfield Auto Mall, or the award of an automobile franchise or dealership in the Chesterfield Auto Mall or the relocation of an automobile franchise or dealership in the Chesterfield Auto Mall.

IT IS FINALLY ORDERED that plaintiffs are awarded costs and reasonable attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.

Dated this 27th day of December, 1989.

/s/ Stephen Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-1867-C-5

ES DEVELOPMENT, INC. and EDWIN G. SAPOT,
Plaintiffs,

vs.

RWM ENTERPRISES, INC., d/b/a MOORE CADILLAC
and MOORE AUTOMOTIVE GROUP, INC.,
d/b/a MOORE HYUNDAI,
Defendants.

MEMORANDUM

Plaintiffs filed this action alleging that defendants, which are two automobile dealerships, entered into a combination or conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 to prevent a competitor from entering the automobile retail market. Plaintiffs sought a temporary restraining order, preliminary injunctive relief and permanent injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. Plaintiffs originally named nine automobile dealers in west St. Louis County, Missouri as defendants. Plaintiffs have settled their dispute with seven defendants and have filed a dismissal as to each.

In an order dated October 6, 1989 the Court denied at that time plaintiffs' motion for a temporary restraining order, and scheduled a hearing on October 23, 1989 to consider plaintiff's request for a temporary restraining order and preliminary injunctive relief. On October 23, 1989 the parties decided at the close of evidence that the Court had before it sufficient evidence to rule on plaintiffs' request for permanent injunctive relief, and agreed to submit the matter to the Court for a decision on the

merits. The Court, having considered the pleadings, testimony of witnesses, and the documents admitted into evidence, hereby makes the following findings of fact and conclusions of law as required by Fed. R. Civ. P. 52.

I. Findings of Fact

Plaintiff Edwin G. Sapot ("Sapot") is the president and whole owner of plaintiff ES Development, Inc. ("ESD"). ESD is a corporation which is in the business of real estate development. The sole enterprise of ESD is the development of the Chesterfield Auto Mall ("Mall") on a ninety acre tract of land in St. Louis County, Missouri. Plaintiffs currently have an option to purchase this tract of land from the owners of the real estate. Although the option recently expired, plaintiffs purchased an extension for $7,000 plus an increase in the cost of the land. The extension on the option contract expires on January 2, 1990.

Plaintiffs have spent approximately $350,000 to date on the development of the Mall. Approximately half of the total expenditures have paid for the option to purchase the tract of land. The remaining expenditures have been for securing government approval of the development and engaging the professional services of an engineering company, an accounting firm, an architectural firm, a construction company, a media consultant firm and a bank.

In February, 1988 plaintiffs began contacting automobile manufacturers regarding their possible placement of a franchise in the Mall. Several major manufacturers, including Ford, expressed an interest in locating or relocating a franchise in the Mall. As of March 31, 1989, however, plaintiffs had not received any firm commitments from a manufacturer. Plaintiffs also engaged in preliminary negotiations with several existing franchisees about placing or relocating a franchise in the Mall. Mr. Randy Blount, who owns a Chevrolet dealership near the

proposed site of the Mall, was interested in relocating his franchise to the Mall. Thomas Bommarito and Frank Bommarito, who own several dealerships in the St. Louis Metropolitan area, expressed an interest in placing a Toyota or Honda franchise in the Mall.

Plaintiffs intend to set up the Mall in a condominium arrangement. Plaintiffs will finance and then complete all construction on the Mall except for the interior finish. The franchisees who obtain franchises in the Mall will purchase the site of their dealership. There will be a common ownership of a body shop, and the franchisees will share common expenses such as advertising. Plaintiffs intend to make a profit from the sale of dealership sites in the Mall, but will not retain any residual interest in the Mall once all the sites are sold. Sapot seeks to obtain at least one franchise inside the Mall, and cites the desire for a Mall franchise as a primary reason for embarking on this development.

The decision whether to place a franchise in an area is typically made by the manufacturer, who then selects a franchisee from among those who have applied for a franchise. The decision to award a new franchise may either be prompted by a market study which reveals the need for a dealership in an area, or an application from a potential franchisee. Prior to awarding a franchise, however, the manufacturers must consider the interests of existing same-line franchises whose profitability may be affected by the new franchise.

Defendants have rights under their franchise agreements with Pontiac Motor Division and Cadillac Motor Division to have their objections considered before a same-line franchise is established near one of their dealerships. Pontiac Motor Division and Cadillac Motor Division must notify defendants of their intention to establish or relocate same-line franchise within twenty miles of one of defendants' franchises. Within thirty days of such notice defendants may voice their objections to the

proposed franchise. Any existing franchise which is located within eight miles of proposed franchise, or has its "primary trade area" within eight miles of the proposed franchise, may seek a review of the decision under the Dealer Appeal Process. Although defendants do not have any rights approaching veto power when the manufacturer seeks to award a same-line franchise near one of defendants' existing franchises, the manufacturer must hear the objections of defendants before awarding a same-line franchise. Defendants may delay a commitment to the proposed franchisee for several months while the fairness of the decision is being deliberated.

The original defendants in this suit were nine automobile dealers which owned automobile dealerships near the proposed site of the Mall.[1] Eight of the nine dealerships are located on a strip of Manchester Road in St. Louis County, within approximately ten miles from the site of the proposed Mall. The dealers heard about the proposed Mall from the media, the dealers' grapevine, and Sapot, who contacted several of the original defendants to ascertain if they were interested in obtaining a franchise in the Mall. The dealers were naturally concerned about the profitability of their existing dealerships if their respective manufacturers would establish a same-line franchise in the Mall. Also, the dealers were concerned that the Mall would divert consumers from the strip on Manchester Road in St. Louis County.

It is unclear who first proposed that dealers with dealerships near the proposed Mall meet to discuss the development of the

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[1] The nine dealers named in the complaint are: Frank Bommarito Oldsmobile Inc.; Beuckman Ford Inc.; Stivers Lincoln-Mercury Inc.; Scott Auto Sales and Finance Co, d/b/a Chrysler Plymouth West; Reuther's Investment Co., d/b/a Reuther's Jeep Eagle; Royal Gate Dodge; Stephen Vincel Honda; RWM Enterprises Inc., d/b/a Moore Cadillac; Moore Automotive Group, Inc., d/b/a Moore Hyundai.

Mall. After the idea was proposed, the dealers called around to other dealers they thought might be interested with an invitation to the first meeting. The first meeting of the dealers occurred on March 31, 1989 in a conference room at the offices of Harold Arbeitman. Harold Arbeitman owns Royal Gate Dodge, a party originally named as a defendant in this suit. The second meeting occurred on April 6, 1989 at the same location. Although the identity of the persons who attended the meetings and the topics discussed at the meetings are somewhat in dispute, the Court considers the following facts concerning what occurred at the two dealers' meetings to be proven with sufficient evidence.

The sole reason why the dealers met on March 31, 1989 and April 6, 1989 was to discuss the development of the Mall. Each meeting of the dealers was attended by approximately ten persons, consisting of one or two attorneys and eight or nine dealers who were competitors in the new and used automobile sales market. Mr. Arbeitman invited his attorney, Mr. Michael Kaemmerer of Buechner, McCarthy, Leonard, Kaemmerer, Owen, & Laderman to attend the first meeting. Mr. Kaemmerer also attended the second meeting. Mr. Laderman, who is a partner of Mr. Kaemmerer, attended at least one of the meetings and possibly both. Defendant Thomas Moore ("Moore"), who owns both dealerships which remain defendants in this suit, attended both meetings. Each of the original defendants in the lawsuit attended at least one of the two meetings.

At the March 31, 1989 meeting the dealers agreed to jointly retain Mr. Kaemmerer to represent them in their opposition to the Mall. Each dealer had the right in his franchise agreement to object to the proposed placement of a same-line franchise within a certain distance from his franchise. Between the first and second meetings, Mr. Kaemmerer drafted for the dealers a form letter of objection. The dealers were told to mail theirs to their respective manufacturers to object to the possible placement of a same-line franchise in the Mall. The form letter provided in part:

> A development known as the Chesterfield Auto Mall is seeking dealers to open new or relocated franchises. *** My concern is focused on your action or potential action with respect to locating a dealership in this market area at or near this geographical point. *** As you know, [Manufacturer/Franchisor] is under a legal obligation, imposed by both U.S. and Missouri law, to deal with me in good faith. I trust that [Manufacturer/Franchisor] will not act arbitrarily, capriciously, or in bad faith when presented with a request for a new or relocated franchise in connection with the Mall and will keep my legitimate franchise interests in mind.

Most, if not all, of the dealers sent letters to their respective manufacturers which were identical in body to the letter drafted by Mr. Kaemmerer. Prior to the March 31, 1989 meeting Moore had a similar letter of objection drafted by another attorney. Moore, however, sent the letter of objection drafted by Mr. Kaemmerer to Pontiac Motor Division and Cadillac Motor Division.[2]

Mr. Randy Blount was present at the first meeting on March 31, 1989. At that time Mr. Blount was interested in relocating his dealership to the Mail. Mr. Blount left the meeting after learning that the purpose of the meeting was to prepare an opposition to the development of the Mall.

At the April 6, 1989 meeting the dealers accepted the name "Dealers Alliance" to describe the dealers who had met in opposition to the Mall on March 31, 1989 and April 6, 1989. Also, the dealers reviewed and adopted a "statement of purpose"

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[2]Mr. Moore did not send a letter of objection to Jaguar, Sterling, or Hyundai because he felt that it was highly unlikely that these manufacturers would consider establishing a dealership in the Mall.

for the Dealers Alliance. The statement of purpose provided in part:

> The purpose of the Dealers Alliance is to explore and advance areas of common and individual dealer concern with respect to actions of franchisors/manufacturers at the proposed Chesterfield Auto Mall, or any similar geographic location. *** The goal of the Dealer Alliance is to investigate and provide facts and evidence to its members and to the automobile manufacturers concerning the potential impact of the foregoing upon existing automobile dealers. The Dealer Alliance seeks to enable the members and the manufacturers to make informed decisions regarding potential new or relocated dealerships. The further goal of the Dealer Alliance is to insure that the legal rights of its individual members are protected.

At the April 6, 1989 meeting the dealers selected three persons: Thomas Bommarito, Harold Arbeitman, and Steven Vincel, as group representatives of the Dealers Alliance.

Also at the April 6, 1989 meeting the dealers agreed to jointly commission a market study to be performed by Dr. Steven Miller, an expert affiliated with St. Louis University. The dealers could use the results of the market study to counter the results of a market study performed by the manufacturers. Also, the results of the market study could be used by a dealer as evidence in a lawsuit filed against a manufacturer for its failure to act in good faith in complying with the terms of the franchise agreement At the time of the April 6, 1989 Moore already had a suit pending against Cadillac Motor Division in which he alleged that Cadillac Motor Division had breached its duty to deal with him in good faith.

Mr. Kaemmerer requested that each dealer complete a questionnaire. At the top of the questionnaire was typed: "Privileged and confidential — prepared in anticipation of litigation." The

questionnaire requested each dealer to furnish Mr. Kaemmerer with a copy of his franchise agreement. The questionnaire also sought any information the dealer knew about, *inter alia*, market studies performed by his respective manufacturer, oral representations by his manufacturer concerning the establishment of new dealerships in the area, and the dealers' relevant market area.

After the letters of objection were sent by the dealers, plaintiffs have been unable to further negotiations with the manufacturers concerning the placement of a franchise in the Mall. Representatives from Ford, who had expressed a strong interest in placing a franchise in the Mall, ceased discussions concerning the placement of a franchise and the possibility that plaintiff would be awarded that franchise. Representatives from Oldsmobile and Cadillac have also declined to proceed with negotiations.

The seven original defendants who have settled agreed to pay plaintiffs an undisclosed sum of money and agreed not to oppose the development of the MalI for a period of two years. Moore, who owns franchises which sell the major lines of Pontiac and Cadillac, and the lesser lines of Hyundai, Sterling, and Jaguar, has not agreed abandon his opposition to the development of the Mall.

II. Conclusions of Law

In their complaint plaintiffs allege that defendants entered into a combination or conspiracy for the purposes of hindering, frustrating, delaying, and preventing the development of the Mall in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 of the Sherman Act provides in part:

> Every contract, combination ..., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal....

15 U.S.C. § 1. There are two essential elements of any Section 1 offense: (1) a contract, combination, or conspiracy, resulting in (2) an unreasonable restraint of trade. *Pumps & Power Co. v. Southern States Industries*, 787 F.2d 1252, 1256 (8th Cir. 1986); *Overseas Motors. Inc. v. Import Motors Limited. Inc.*, 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd* 519 F.2d 119 (6th Cir.) *cert. denied* 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975).

A. Proof of Combination or Conspiracy

To find a violation of Section 1, the Court must first find the existence of a contract, combination, or conspiracy. *International Travel. Arrangers. Inc. v. Western Airlines,* 623 F.2d 1255, 1265 (8th Cir.), *cert. denied* 499 U.S. 1063, 101 S.Ct. 787, 66 L.Ed.2d 605 (1980). In the field of Sherman Act violations a conspiracy, as in other proscribed conspiracies, imports a plurality of persons acting in concert to attain a common goal or purpose. *White v. Hearst Corp.*, 669 F.2d 14, 18 (lst Cir. 1982). The Sherman Act is not concerned with the actions of an individual entity, no matter how anticompetitive the motive or effect, unless that individual entity possesses monopoly power. *Pumps & Power Co. v. Southern States Industries,* 787 F.2d 1252 (8th Cir. 1986).

Proof of a conspiracy may be by direct or circumstantial evidence. Conspiracies are rarely evidenced by direct evidence such as explicit agreements, but must almost always be proved by "inferences that may fairly be drawn from the behavior of the alleged conspirators." *H.L. Moore Drug Exchange v. Eli Lilly and Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied* 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982) (quoting *Michelman v. Clark-Schwebel Fiver Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied,* 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976). It is permissible for a court to infer a conspiracy from the actions taken by the alleged co-conspirators. The circumstances surrounding a particular course of conduct may justify an infer-

ence of collusion even though there is no evidence of the acts by which the conspiracy was formed. *Overseas Motors. Inc. v. Import Motors Limited. Inc., supra,* 375 F. Supp. at 531.

In determining whether a conspiracy exists the Court considers whether the evidence, direct or circumstantial, "reasonably tends to prove that the [alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective."' *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984) (citations omitted). "Circumstantial evidence must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."' Id. (citation omitted). Finally, although items of evidence considered separately may not justify an inference of conspiracy or combination, the items may be sufficient when viewed together as part of a mosaic. *H.L. Moore Drug Exchange v. Eli Lilly and Co., supra,* 662 F.2d at 945-46 (*citing Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99, 82 S.Ct. 1404, 1409-10, 8 L.Ed.2d 777 (1962).

In the instant matter there is overwhelming evidence that the dealers present at the aforementioned meetings on March 31, 1989 and April 6, 1989 entered into a conspiracy .to prevent the development of the Mall. There is also sufficient evidence that Moore was a part of that conspiracy. The dealers, who were all competitors in the markets for new and used automobiles, met on two occasions to discuss the birth of a new competitor that could draw consumers away from their dealerships and impose a substantial threat to their profitability. Also, the dealers who met on April 6, 1989 accepted the name "Dealers Alliance," and adopted a statement of purpose which committed them, in part, "to explore and advance areas of common and individual dealer concern with respect to actions of franchisors/manufacturers at the proposed Chesterfield Auto Mall...." The facts that dealers who are ordinarily competitors met to discuss the Mall, and then

adopted a name and common purpose regarding the Mall is substantial evidence on which the Court could justify the inference of a conspiracy. The dealers, however, took further steps toward their goal of preventing the development of the Mall.

The dealers agreed to jointly retain Mr. Michael Kaemmerer, an attorney invited to the first meeting by Harold Arbeitman, to advise them of their legal rights against their respective manufacturers. Mr. Kaemmerer drafted a form letter of objection concerning the Mall which most, if not all, the dealers sent to their respective manufacturers. The letters sent to the various manufacturers were identical with only minor changes to identify the proper sender and recipient. The dealers agreed to jointly fund a market study which could be used by each dealer in his opposition to the manufacturers decision to establish a dealership in the Mall, or in possible litigation against the manufacturer for failure to deal with the dealer in good faith under 15 U.S.C. §§ 1221-1225. Finally, the dealers completed a questionnaire and furnished Mr. Kaemmerer with a copy of their franchise agreement "in anticipation of litigation" against the dealers' respective manufacturers/franchisors.

Moore's attendance and actions at the dealers' meetings place him inside the conspiracy. Unlike Mr. Blount, who left after he discovered the purpose of the meetings, Moore attended both the March 31, 1989 and April 6, 1989 meetings. Also, Moore sent the letter drafted by Mr. Kaemmerer to two of his manufacturers even though he already had a similar letter of objection drafted by another attorney.

Defendants argue that it is not reasonable for the Court to infer a conspiracy because the sole concern of each dealer at the meetings was the protection of his individual rights under his franchise agreement. Each dealer could have contacted his individual attorney if his sole concern was the protection of his

individual rights under his franchise agreement. Although the Court believes the dealers' primary concern with regard to the Mall may have been the threat of a same-line franchise placed in the Mall, the Court believes that the motivating factor in having the dealers meet and engage in parallel protests was to eliminate the threat of the Mall entirely, regardless of which automobile lines were sold there.

Eight of the nine original defendants in this suit own dealerships on a strip of Manchester Road in Saint Louis County, Missouri. If the Mall was completed, consumers who would ordinarily do their automobile shopping on this strip of Manchester Road might be diverted to the Mall instead. The completion of the Mall, though, depends largely on whether plaintiffs will exercise their option to purchase the real estate. Plaintiffs will not exercise that option if they do not believe they can interest a sufficient number of manufacturers in placing a franchise in the Mall. Under the terms of the dealers' franchise agreements, manufacturers cannot make a commitment to establish a franchise in the Mall until the manufacturers have considered the interests of existing franchises within a certain distance of the proposed Mall site. Therefore, if dealers which represent the major automobile lines all file their objections with their manufacturers or file lawsuits against their manufacturers, the manufacturers will be prevented from making a commitment to plaintiffs until the dealer appeal process has ended. Plaintiffs, which are unwilling to proceed with the development of the Mall without a sufficient showing of commitment from manufacturers, will not exercise their option to purchase the real estate and the threat posed by the Mall disappears. The Court believes that the motive behind the dealers' meetings and the parallel actions of the dealers in objecting to their respective manufacturers was designed to dissuade plaintiffs from exercising their option to purchase the real estate.

B. Unreasonable Restraint of Trade

The second element of a violation of Section 1 of the Sherman Act is that the conspiracy must result in an unreasonable restraint of trade. The second element may be established by proof that the conspiracy was of a type that the law finds to be inherently unreasonable (a *per se* violation), or it may rest on a showing of anticompetitive motive or effect in the particular case (a rule of reason violation). *Overseas Motor. Inc. v. Import Motors Limited, Inc., supra,* 375 F. Supp. at 531.

The Court must first characterize the nature of the restraint found in the instant matter. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics v. Sharp Electronics,* 485 U.S. 717, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Defendants argue that the restraint in question here, which they assert consists of the letters of objection sent to the manufacturers by the dealers, is a non-price vertical restraint and should be analyzed as such. Defendants, however, mistake which restraint is the source of the alleged antitrust violation. The subject of this lawsuit is the agreement among the dealers, who were all competitors in the retail automobile market, to take the parallel actions of filing letters of objection and pursuing other avenues to dissuade their manufacturers from placing a franchise in the Mall. This type of agreement among competitors is clearly a horizontal non-price restraint.

There is persuasive authority which considered an agreement among competitors as a *per se* unreasonable restraint of trade. In *Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190 (6th Cir. 1982), the Court stated: "[R]estrictive agreements among independent business entities at the same level of the market, so called 'horizontal agreements', are found to have a

pernicious effect upon competition and to lack redeeming virtue, so that analysis proceeds under a *per se* illegal rule. *See also Quality Mercury. Inc. v. Ford Motor Co.*, 542 F.2d 466, 471 n.5 (8th Cir. 1976), *cert. denied* 433 U.S. 914, 97 S.Ct. 2986, 53 L.Ed.2d 1100 (1977); *Plueckhahn v. Farmers Insurance Exchange*, 749 F.2d 241 (5th Cir.), *cert. denied* 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

Although there is support for the argument that defendants' restraint constitutes a *per se* violation of the Sherman Act, the Court will also analyze the restraint under the rule of reason. Under the rule of reason the primary considerations of the Court in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects. *Rosebrough Monument Co. v. Memorial Park Cemetery, supra,* 666 F.2d at 1138.

In the instant matter the intent of the restraint, which was to prevent a competitor from entering the market, was certainly anticompetitive. On one level the dealers sought to prevent their respective manufacturers from placing a same-line franchise at the Mall to compete directly with their established franchise several miles away. On a second level, however, the dealers sought to prevent the development of the Mall which, regardless of whether a same-line franchise was placed in it, would divert consumers away from the automobile retail strip on Manchester where most of the original defendants own franchises.

The effect of the restraint was also anticompetitive. Since the dealers sell automobile lines which represent the major automobile lines sold in the United States, the organized opposition of the dealers would either prevent or frustrate very important manufacturers from making a commitment to the Mall. If plaintiffs could not get manufacturers for the major automobile lines in the United States to even negotiate as the expiration for the

option neared, the real estate deal would likely fall apart and the threat of a nearby Mall would disappear. Therefore, the anticompetitive purpose of the restraint and the anticompetitive effects of the restraint clearly indicate that the restraint constituted an unreasonable restraint of trade.

Defendants assert that there exists a conspiracy among Edwin Sapot, Michael Kaemmerer, and Harold Arbeitman. As has been discussed, *supra*, the attorney Michael Kaemmerer was present at the dealers' meetings on March 31, 1989 and April 6, 1989 and was jointly retained by the dealers to represent their interests in opposition to the Mall. Mr. Kaemmerer represented Mr. Arbeitman prior to the meeting on March 31, 1989, and was invited to the meeting by Mr. Arbeitman.

Mr. Arbeitman and Mr. Sapot are brothers-in-law who have jointly owned and operated an automobile dealership. In 1985, Mr. Arbeitman sold his share to Mr. Sapot. Since 1985 Mr. Arbeitman and Mr. Sapot have neither maintained a business nor a social relationship. Mr. Kaemmerer has represented Mr. Sapot for several legal problems concerning labor law. In 1985 Mr. Kaemmerer represented plaintiff in an action before the National Labor Relations Board which is still pending. In 1988 Mr. Kaemmerer helped Mr. Sapot with labor problems in connection with plaintiff's potential purchase of an automobile dealership.

After the first dealers ' meeting on March 31, 1989 Mr . Sapot spoke with Mr. Kaemmerer about legal matters which are unrelated to this suit. Although Mr. Sapot was aware that Mr. Kaemmerer had attended the March 31, 1989 meeting, Mr. Sapot asserts that at his meeting with Mr. Kaemmerer neither he nor Mr. Kaemmerer mentioned the March 31, 1989 dealers' meeting.

There is no evidence of a conspiracy between Mr. Sapot, Mr. Kaemmerer, and Mr. Arbeitman, and their relationships with each other do not have any bearing on the antitrust violations of

defendants. Mr. Kaemmerer, however, may have violated his ethical duties concerning the representation of conflicting interests if the allegations of defendants are true.

III. Remedies

A. Injunctive Relief

Plaintiff filed this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26 seeking a temporary restraining order, preliminary injunctive relief and permanent injunctive relief. After a hearing on October 23, 1989 to consider plaintiffs' requests for a temporary restraining order and preliminary injunctive relief, the parties agreed to submit the matter to the Court for a final decision on the merits. Therefore, the only relief currently sought by plaintiffs is permanent injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.

"The standard for the granting of permanent injunctive relief under Section 16 of the Clayton Act is somewhat different from the standard for the award of damages. In the injunction context, once a determination has been made that the defendant has violated the antitrust laws, a plaintiff need only demonstrate a 'threatened loss of damage' growing out of the violation, 15 U.S.C. § 26. Injunctive relief, therefore, is 'available even though plaintiff has not yet suffered [or proved] actual injury; [the plaintiff] need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.'" *Rosebrough Monument Co. v. Memorial Park Cemetery,* 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1981) (quoting, *Zenith Radio Corp. v. Hazeltine Research. Inc.,* 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969).

In the instant matter there has been a violation of the antitrust laws. Due to the nature of the violation and the circumstances

surrounding the development of the Mall, the Court concludes that defendants continued opposition constitutes a threatened loss of damages and therefore permanent injunctive relief is appropriate. Defendants have filed objections with Pontiac Motor Division and Cadillac Motor Division, manufacturers which represent two major American automobile lines. Defendants also own franchises for Hyundai, Jaguar, and Sterling, but have not yet filed an objection concerning the Mall with these manufacturers. Through the exercise of their rights under their franchise agreements, United States law, and Missouri law defendants may prevent these manufacturers from placing a franchise in the Mall. By filing an objection defendants will delay these manufacturers from making a commitment to plaintiffs. Since the completion and ultimate success of the Mall depends in part on the number and variety of manufacturers who place franchises in the Mall, defendants continued opposition, which will affect the manufacturer's decision, represents a threatened loss of damages to plaintiffs. Therefore, the Court concludes that permanent injunctive relief is appropriate.

B. Costs and Attorney's Fees

The Court concludes that plaintiffs have substantially prevailed in this suit against defendants, and are therefore entitled to costs and reasonable attorney's fees pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. Since plaintiffs originally brought this suit against nine defendants, seven of which settled after a substantial amount of work by plaintiffs' counsel had been completed, the Court is not inclined to award plaintiff the total amount of costs and attorney's fees authorized under this statute. Instead, the Court will review the documentation submitted by plaintiff concerning costs and attorney's fees and determine a fair portion of costs and attorney's fees for which defendants are liable.

Dated this 27th day of December, 1989.

/s/ Stephen Limbaugh
UNITED STATES
DISTRICT JUDGE

(2)

No. 91-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RWM ENTERPRISES, INC. and
MOORE AUTOMOTIVE GROUP, INC.,
Petitioners,

vs.

ES DEVELOPMENT, INC. and
EDWIN G. SAPOT,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALAN E. POPKIN
Counsel of Record
MICHAEL H. WETMORE
HUSCH & EPPENBERGER
100 North Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-4800

Counsel for Respondents

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents ES Development, Inc. and Edwin G. Sapot respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Petitioners' "statement of the case" and characterization of the "facts" as found by the District Court, are misleading in numerous respects. Petitioners' statements that their activity found to violate the antitrust laws was "admittedly legal and proper" and

was engaged in "with a legitimate purpose and through legitimate means" (Br. at 4) indicates how Petitioners have chosen to present this Court with a version of the facts rejected by both the District Court and the Court of Appeals.

The actual facts of this case, as found by the District Court, appear at pages 27-33 of the Appendix.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners and the seven other automobile dealers sued by Respondents formed the Dealer Alliance and "agreed to undertake action to frustrate the plans of their prospective competitor." App. at 12. Far from being "legal and proper" or "legitimate", the Dealer Alliance engaged in a series of concerted activities designed to ensure that no automobile manufacturer committed to place a dealership in the Mall. The Petitioners knew that without such commitments, the Mall would not be built and a competitive threat to their own dealerships would not occur. The District Court found, and the Court of Appeals agreed, that the Petitioners "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, ..." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

Petitioners contend that they did nothing more than exercise rights granted under their franchise agreements. Br. at 6. While perhaps free to do so acting alone, "[t]he evidence here, however, compels the inference that the dealers chose to exercise their individual legal rights in a concerted manner designed to impair [Respondents'] ability to procure franchise commitments from various manufacturers." App. at 13. The District Court rightly found that the "motivating factor" in the Petitioners and their co-conspirators' parallel protests was to eliminate the Mall as a competitive threat. App. 37. It is difficult to imagine a more clear cut and direct concerted antitrust conspiracy.

Petitioners also contend that none of the acts undertaken to oppose the Mall was in itself illegal. Br. at 5. In a leap of logic unsupported in antitrust law, Petitioners conclude that their activities were immune from antitrust liability since they did not "achieve an unlawful objective." Br. at 5. Through concerted activity, Petitioners sought to restrain competition—the very essence of "unlawful" activity under Section 1 of the Sherman Act.

In finding their conduct violative of the antitrust laws, the District Court and the Court of Appeals applied settled antitrust principles to the clear combination in which Petitioners engaged. These principles establish that "[a]cts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade." *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587 (7th Cir. 1977), *cert. denied*, 439 U.S. 1090 (1979); *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 (1962); *Simpson v. Union Oil Co.*, 377 U.S. 13, 21 (1964); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948) ("[e]ven an otherwise lawful device may be used as a weapon in restraint of trade . . . .") Both the District Court and the Court of Appeals found that no automobile dealer, acting alone, could have achieved the anticompetitive result that the Petitioners, in concert with their co-conspirators, intended to achieve and did in fact achieve. App. at 15, 36-37. The Petitioners' activities were found to have been "conceived in a purpose to unreasonably restrain trade." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. at 469.

Petitioners also contend that they could not have run afoul of the antitrust laws because they were simply exercising their First Amendment right to commercial speech. As the Court of Appeals noted, "the exercise of such rights as an integral part of an illegal conspiracy will not shield the conspirators from antitrust liability." App. at 15; *see, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14 (1972).

Petitioners' First Amendment argument would emasculate the antitrust laws. For example, if Petitioners' argument were adopted, no one would be found liable for price fixing, because the essential communication fixing prices would be protected speech under the First Amendment. This Court has previously rejected Petitioners' reliance on the First Amendment as a shield against antitrust liability. "It is well settled that First Amend-

ment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transp. Co.*, 404 U.S. at 514.

CONCLUSION

Petitioners' conduct represented a classic combination or conspiracy in restraint of trade. The District Court and the Court of Appeals relied on settled antitrust principles in imposing liability on Petitioners. Respondents respectfully pray that the Court deny the Petition.

Respectfully submitted,

Alan E. Popkin
Counsel of Record
Michael H. Wetmore
HUSCH & EPPENBERGER
100 North Broadway, Suite 1300
St. Louis, Missouri 63102
(314) 421-4800

Attorneys for Respondents